

Fordham Urban Law Journal

Volume 40 | Number 4

Article 7

March 2016

Turf Wars and Growing Pains: How New York Education Law Can Ease the Co-Location Battle

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Recommended Citation

Joanna Zdanys, *Turf Wars and Growing Pains: How New York Education Law Can Ease the Co-Location Battle*, 40 Fordham Urb. L.J. 1539 (2013).

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TURF WARS AND GROWING PAINS: HOW NEW YORK EDUCATION LAW CAN EASE THE CO-LOCATION BATTLE

*Joanna Zdanys**

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* J.D., 2013, Fordham Law School; M.A., 2009, Columbia University; B.A., 2007, Yale University. I would like to thank Professor Aaron Saiger for his guidance in developing this topic and for his helpful feedback. I would also like to thank the staff and editors of the *Fordham Urban Law Journal*, particularly Joseph Kim and Will Madden, for their editorial assistance.

INTRODUCTION

On a Wednesday night in the middle of January, a crowd gathers inside Brooklyn Technical High School in New York City.¹ Some hold signs, and others blow whistles.² A few words escalate into a shouting match.³ Journalists snap photographs and capture sound bytes.⁴ The crowd has gathered in protest because the Panel for Education Policy (PEP) is about to hold a meeting, during which it will vote on the possible co-location of a charter school with a public school.⁵ “Co-location” is the practice of housing two or more schools in the same public school building.⁶ As charter schools multiply in number throughout New York City, scenes similar to this one have become increasingly familiar to teachers, administrators, parents, charter school supporters, advocates of traditional public schools, and students of all ages.⁷

The storm over school co-location is a byproduct of the charter school movement, which has garnered both strong support and fierce

1. See Mary Ann Giordano, *Teachers Turn Out in Force at PEP Meeting*, WNYC SCH. BOOK (Jan. 19, 2012, 7:58 AM), <http://www.schoolbook.org/2012/01/19/teachers-turn-out-in-force-at-pep-meeting/>.

2. See *id.*

3. See *id.*

4. See *id.*

5. See *id.*

6. See, e.g., N.Y.C. DEP'T OF EDUC., REVISED EDUCATIONAL IMPACT STATEMENT: THE PROPOSED RE-SITING AND CO-LOCATION OF BROOKLYN EAST COLLEGIATE CHARTER SCHOOL WITH EXISTING SCHOOLS P.S. 9 TEUNIS BERGEN AND M.S. 571 THE BERGEN UPPER SCHOOL IN BUILDING K009 1 (2011), *available at* http://schools.nyc.gov/NR/ronlyres/B9981853-F376-401B-B2FD-601CC0136BC8/0/SECONDAAMENDED_EIS_K571Replacementvfinal.pdf (“A ‘co-location’ means that two or more school organizations are located in the same building”); NICOLE MANNERS & URSULINA RAMIREZ, N.Y.C. OFFICE OF THE PUB. ADVOCATE, CONSENSUS FOR REFORM: A PLAN FOR COLLABORATIVE SCHOOL CO-LOCATIONS 1 (2011), *available at* <http://pubadvocate.nyc.gov/news/2011-07-20/consensus-reform-plan-collaborative-school-co-locations> (defining “co-location” as “placing multiple schools in individual buildings”).

7. See, e.g., Rose D’Souza, *Harlem Parents Protest Against Success Academy Co-Locations*, GOTHAM SCHS. (June 22, 2012, 1:10 PM), <http://gothamschools.org/2012/06/22/harlem-parents-protest-against-success-academy-co-locations/>; Mary Frost, *Tilden Supporters Protest Plan to Add Another School to Brooklyn Campus*, BROOKLYN DAILY EAGLE (Mar. 7, 2013 PM), <http://www.brooklyneagle.com/articles/tilden-supporters-protest-plan-add-another-school-brooklyn-campus>; Patrick Wall, *Bronx Students Walk Out of Class to Protest Charter Co-Location Plan*, DNAINFO N.Y. (Mar. 9, 2012, 6:49 PM), <http://www.dnainfo.com/new-york/20120309/south-bronx/bronx-students-walk-out-of-class-protest-charter-co-location-plan> (describing a student protest of a charter school co-location);

opposition. Charter schools are publicly funded, tuition-free schools that are exempt from some of the rules and regulations that govern traditional public schools.⁸ Private individuals, nonprofit organizations, and for-profit companies can create charter schools,⁹ and in some instances, a traditional public school can be converted to a charter school.¹⁰ Supporters laud charter schools for offering parents the option of choosing a public school other than their children's assigned district schools,¹¹ for providing high-quality education to children in traditionally underserved communities,¹² and for allowing educators to experiment with new approaches to curriculum.¹³ Others argue that charter schools can "generate competitive effects that drive up the quality of both charter and traditional public schools."¹⁴ The results of a 2013 Stanford CREDO study found that students in New York City charter schools on average learned significantly more in reading and mathematics than their counterparts in traditional public schools.¹⁵ Opponents to charter schools, however, paint a much different picture. They argue that charter schools siphon off resources from traditional public schools¹⁶ and do not necessarily produce better outcomes for students across the board.¹⁷

8. James E. Ryan, *Charter Schools and Public Education*, 4 STAN. J. CIV. RTS. & C.L. 393, 394 (2008).

9. *Id.* at 394–95.

10. *Id.* Under the Obama Administration's final regulations for the Race to the Top Fund, a \$4.35 billion dollar fund granting states grants to spur innovation in education, the conversion of a traditional public school to a charter school constitutes an acceptable "school turnaround strategy." See Benjamin Michael Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 MO. L. REV. 81, 101, 115 (2011).

11. CREDO, MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 9 (2009), available at http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf.

12. Ryan, *supra* note 8, at 399 ("Charter schools educate a disproportionate number of poor, low-performing, and African-American students.")

13. *Id.* at 395.

14. Superfine, *supra* note 10, at 117.

15. CREDO, CHARTER SCHOOL PERFORMANCE IN NEW YORK CITY 14 (2013), available at http://credo.stanford.edu/documents/NYC_report_2013_FINAL_20130219.pdf.

16. See Jessica P. Driscoll, *Charter Schools*, 8 GEO. J. ON POVERTY L. & POL'Y 505, 506 (2001) ("Public school funding is traditionally distributed on a per-student basis; therefore, as students move from the traditional public school system to charter schools, so do resources and funding.")

17. See, e.g., Shannon K. McGovern, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1538

Charter schools have risen in prominence in New York City in recent years. There are currently 159 charter schools operating in the five boroughs.¹⁸ Mayor Michael Bloomberg is a vocal supporter of the charter school movement and has promoted the growth of charter schools and the policy of co-locating charters with public schools.¹⁹ As of 2010, 102 charter schools shared space with other schools in public school buildings.²⁰ Co-location is not a new or novel practice in New York City, nor is it confined to charter schools; the majority of the city's public schools inhabit the same building as another public school.²¹ Co-located schools often share resources, such as cafeterias, gymnasiums, auditoriums, and schoolyards.²²

Although the co-location of two or more traditional public schools in the same building has been fairly commonplace in New York City, the increasing frequency of the co-location of charter schools with public schools has become a matter of particular contention in New York. Most other cities in the United States do not co-locate their charter schools with public schools.²³ New York City schools, however, face challenges when seeking space that most other school systems need not contend with, including limited available physical space to develop,²⁴ the high cost of real estate,²⁵ and large student

(2011) (citing CREDO, *supra* note 11, at 1) (“Nearly half of the charter schools nationwide have results that are no different from the local public school options and over a third, 37 percent, deliver learning results that are significantly worse than their student would have realized had they remained in traditional public schools.”).

18. N.Y.C. CHARTER SCH. CTR., WHAT ARE CHARTER SCHOOLS? (2012), available at <http://issuu.com/charter411/docs/brochure/2>.

19. Anna M. Phillips, *Charter School Leaders Hunt for Their Mayoral Candidate*, WNYC SCH. BOOK (Dec. 16, 2011, 12:26 AM), <http://www.schoolbook.org/2011/12/16/charter-school-leaders-hunt-for-their-mayoral-candidate/>.

20. See Anna M. Phillips, *City Councilmembers Say Co-location Complaints Come to Them First*, WNYC SCH. BOOK (Apr. 19, 2012, 7:44 PM), <http://www.schoolbook.org/2012/04/19/city-councilmembers-say-co-location-complaints-come-to-them-first>; see also N.Y.C. INDEP. BUDGET OFFICE, FEBRUARY 2010 FISCAL BRIEF: COMPARING THE LEVEL OF PUBLIC SUPPORT: CHARTER SCHOOLS VERSUS TRADITIONAL PUBLIC SCHOOLS 1 (2010), available at <http://www.ibo.nyc.ny.us/iboreports/charterschoolsfeb2010.pdf>.

21. *Campus Governance*, N.Y.C. DEP'T OF EDUC., <http://schools.nyc.gov/community/campusgov/default.htm> (last visited June 9, 2013) (“[M]ore than half of all schools throughout the city are co-located on campuses with other schools and programs.”).

22. N.Y.C. DEP'T OF EDUC., *supra* note 6, at 1.

23. N.Y.C. INDEP. BUDGET OFFICE, *supra* note 20, at 1.

24. Daniel Lautzenheiser, *A Tale of Two Schools: What New York Department of Education Is Getting Right*, HUFFINGTON POST (July 24, 2012, 10:33 AM), http://www.huffingtonpost.com/daniel-lautzenheiser/a-tale-of-two-schools_b_1698024.html.

populations.²⁶ For these reasons, supporters of co-location argue that charter schools would not be able to open as readily without the option to co-locate with a public school.²⁷ Opponents of co-location argue that charter schools take away valuable resources within their buildings, such as access to specialized facilities,²⁸ and threaten to exacerbate overcrowding.²⁹ As charter schools have burgeoned in the five boroughs of New York City, opposition in the form of protests and even litigation over co-location has become more common.

This Note does not advocate for or against the expansion of charter schools as an educational option, nor does it intend to editorialize upon the quality of education that charters offer. Rather, it posits that current New York laws and regulations cannot adequately facilitate the difficult process of charter school co-location in a way that meets the needs and protects the interests of all parties involved. This Note argues that, in order both to stem the tide of litigation that is likely to increase as the number of charter schools in New York increases and to provide more equitable learning environments for students in both traditional public and charter school settings, New York's Education Law must be revised to contain more transparent and definitive criteria for building selection, the public hearing process must be altered, and more rigorous collaboration and communication should be required to take place between representatives from co-located schools.

25. N.Y.C. CHARTER SCH. CTR., CO-LOCATION: HOW PUBLIC SCHOOLS SHARE SPACE IN NEW YORK CITY 1 (2012), *available at* http://www.nyccharterschools.org/sites/default/files/resources/nyccsc_colocation_fact_sheet.pdf.

26. There are approximately 1.1 million students in the New York City public school system. *About Us*, N.Y.C. DEP'T OF EDUC., <http://schools.nyc.gov/AboutUs/default.htm> (last visited June 9, 2013).

27. Philissa Cramer, *Call for Ban on Co-Locations Has Charter School Backers Nervous*, GOTHAM SCHS. (Jan. 31, 2013, 6:08 PM), <http://gothamschools.org/2013/01/31/call-for-ban-on-co-locations-has-charter-school-backers-nervous/> ("Blocking co-locations and the school closures that often make space for them would be a serious blow to the city's charter sector, which has flourished because the Bloomberg administration has offered more than 100 charter schools free space in district buildings. It would be difficult for new schools to open at the same pace if they had to find and pay for private space.").

28. *See, e.g.*, BILL DEBLASIO, THE ALLIANCE FOR QUALITY EDUC., *BREAKING DOWN BARRIERS: AN EVALUATION OF PARENT ENGAGEMENT IN SCHOOL CLOSURES AND CO-LOCATIONS* 8 (2010), *available at* <http://advocate.nyc.gov/files/ParentalEngagementReport-7.21.10.pdf> (noting that if a co-location makes a school space more constricted, that libraries, labs, and cluster rooms may be converted into classrooms).

29. *Id.* (noting that classroom space may be sacrificed to accommodate an incoming school, which may result in increased class size).

Part I of this Note discusses the charter school landscape in New York City and the circumstances giving rise to the increased co-location of charter schools with public schools. It highlights the pro-charter provisions of the Obama Administration's Race to the Top program, New York State's two applications to Race to the Top, and the amendments to New York State charter school laws that were enacted in part to contribute to New York's success in receiving federal funding under that program. Part II describes the practical challenges that arise at each stage of the co-location process, from the point at which a particular school building is determined to be a candidate for co-location to the point where schools actually co-exist with one another. To highlight these challenges, this Part will discuss recent litigation that illustrates these challenges and demonstrates the tensions that persist between charter schools, public schools, and the communities in which they reside. Part III will raise potential solutions to the challenges that co-location brings about and will offer suggestions for how current laws and regulations should be re-drafted to address these problems.

I. NEW YORK CITY'S CHARTER SCHOOL BOOM

A. Race to the Top and the Obama Administration's Support for Charter School Growth

In 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA) to stimulate the economy in the wake of the financial crisis.³⁰ Among its provisions, the ARRA designates \$4.35 billion to the Race to the Top Fund (RTTTF), a competitive grant program designed to encourage and reward states that "creat[e] the conditions for education innovation and reform."³¹ In November of 2009, the U.S. Department of Education released the Executive Summary on Race to the Top, which enumerated the criteria through which states would be eligible to earn federal funding under the program.³² Each criterion corresponds to a certain number of points out of a total of 485 points that a state may try to accumulate.³³ These criteria vary from "State Success Factors," which

30. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

31. U.S. DEP'T OF EDUC., RACE TO THE TOP EXECUTIVE SUMMARY 2 (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

32. *See generally id.*

33. *See id.* at 3.

include “[d]emonstrating significant progress in raising achievement and closing gaps,” to “Data Systems to Support Instruction,” which includes “using data to improve instruction,” to “Great Teachers and Leaders,” which focuses on improving teacher and principal effectiveness.³⁴

The criteria for selection devote fifty-five points to “General Selection Criteria,” which consist of three factors: (1) making education funding a priority; (2) ensuring successful conditions for high-performing charters and other innovative schools;³⁵ and (3) demonstrating other significant reform conditions.³⁶ Ensuring successful conditions for high-performing charters and other innovative schools accounts for forty out of the category’s fifty-five possible points.³⁷ The forty points dedicated to charter schools comprise eight percent of the total points available under RTTTF.³⁸ Although this figure may appear insignificant in the scheme of the total points available, only two of the nineteen factors on the RTTTF scoring rubric are worth more points.³⁹ The extent to which a state accommodates and creates successful conditions for charter schools has the potential to push one state’s total score far beyond that of other states deemed inhospitable to charter schools, especially if a state has difficulty picking up enough points in other areas to make up the difference. In short, states that encourage the development of charter schools could have a competitive advantage over states that do not.

In the first phase of Race to the Top, only two states—Delaware and Tennessee—were awarded federal funding.⁴⁰ Fourteen other

34. *Id.*

35. To measure the extent to which a State ensures successful conditions for charter schools, reviewers consider the extent to which “the State has a charter school law that does not prohibit or effectively inhibit increasing the number of high-performing charter schools in the state” and the extent to which the State “provides charter schools with funding for facilities (for leasing facilities, purchasing facilities, or making tenant improvements), assistance with facilities acquisition, [and] access to public facilities. *Id.* at 11.

36. *Id.*

37. *Id.*

38. *Id.* at 11.

39. *Id.* at 6–11. These factors are “[a]rticulating [the] State’s education reform agenda,” worth sixty-five points, and “[i]mproving teacher and principal effectiveness based on performance,” worth fifty-eight points. *Id.* at 3.

40. Press Release, U.S. Dep’t of Educ., Delaware and Tennessee Win First Race to the Top Grants (Mar. 29, 2010), *available at* <http://www.ed.gov/news/press-releases/delaware-and-tennessee-win-first-race-top-grants>.

states, including New York, were named finalists but ultimately left empty-handed.⁴¹ New York ranked fifteenth out of the forty-one states that submitted applications.⁴² The scores and reviews that New York's application received indicated that the state's charter school laws detracted from the strength of its application. In the first round, New York received 27.4 out of 40 possible points under the criterion of "[e]nsuring successful conditions for high-performing charter schools and other innovative secondary schools."⁴³ One reviewer noted that New York's charter cap of 200 "by definition put[] the applicant in [a] low cap category."⁴⁴ A second reviewer noted,

When asked to comment on the cap the NY team's response was not convincing enough to allay fears that, as a state, NY lacks the collective will to make critical changes to existing laws that act as impediments to substantive reform. A limit of 200 start-up charters in a state with over 4500 schools, coupled with the lack of a convincing rationale for such a cap, is significant and cause for a further deduction in this area.⁴⁵

A third reviewer simply noted, "The cap on the charter law does have the effect to be severely inhibiting on new charter schools."⁴⁶ Although charter advocates previously had regarded the charter school cap as an arbitrary obstacle to charter school development,⁴⁷

41. Press Release, U.S. Dep't of Educ., 16 Finalists Announced in Phase 1 of Race to the Top (Mar. 4, 2010), *available at* <http://www.ed.gov/news/press-releases/16-finalists-announced-phase-1-race-top-competition-finalists-present-mid-march->

42. U.S. DEP'T OF EDUC., RACE TO THE TOP PHASE 1 FINAL RESULTS (2010), *available at* <http://www2.ed.gov/programs/racetothetop/phase1-applications/score-summary.pdf>.

43. U.S. DEP'T OF EDUC., RACE TO THE TOP PANEL REVIEW BY APPLICANT FOR NEW YORK, PHASE 1 (2010), *available at* <http://www2.ed.gov/programs/racetothetop/phase1-applications/score-sheets/new-york.pdf>.

44. U.S. DEP'T OF EDUC., RACE TO THE TOP TECHNICAL REVIEW FORM—TIER 2: NEW YORK APPLICATION #4800NY-1, at 6 (2010), *available at* <http://www2.ed.gov/programs/racetothetop/phase1-applications/comments/new-york.pdf>.

45. *Id.* at 11.

46. *Id.* at 8; *see also* N.Y.C. CHARTER SCH. CTR., THE CLASS CEILING: LIFTING THE CAP ON NEW YORK'S CHARTER SCHOOLS 6–7 (2009), *available at* <http://www.nyccharterschools.org/learn/data-a-reports> (stating that when charters are uncertain, school planning teams may not make the investment of time and resources to plan a new charter school); Aaron J. Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909, 960 (2007) ("Direct regulation of schools of choice restricts their ability to respond to parental preferences and their willingness to enter or remain in business.").

47. N.Y.C. CHARTER SCH. CTR., *supra* note 46, at 7.

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the outcome of New York's first application to RTTTF demonstrated that the cap disadvantaged charter schools and traditional public schools alike by shortchanging the state of the opportunity to gain millions of dollars in federal funding.⁴⁸ Throughout the state, momentum against the charter school cap grew, and pressure to amend the law and raise the cap increased.⁴⁹

B. Charter School Legislation and Race to the Top in New York State

The New York Charter Schools Act of 1998 ("the Act" or "the Charter Schools Act") was the first legislation to authorize charter schools in New York State.⁵⁰ The Act governs all aspects of establishing and maintaining charter schools in the state, from the initial process of applying to one of the three charter entities in the state,⁵¹ to the issuance of charters,⁵² to the process of reviewing charter schools' progress once they are in operation.⁵³ In New York State, applicants for charters may submit their applications to one of three entities for approval: the board of education of the school district in which the applicant seeks to open a charter school;⁵⁴ the Board of Trustees of the State University of New York;⁵⁵ and the

48. See, e.g., MICHAEL REGNIER, N.Y.C. CHARTER SCH. CTR., *SPRINTING TO THE FINISH: WHY NEW YORK LOST ROUND 1 OF THE RACE TO THE TOP, AND HOW IT CAN WIN \$700 MILLION IN ROUND 2*, at 2 (2010), available at <http://www.nyccharterschools.org/meet/blog/473-new-white-paper-how-ny-lost-rtttt-round-1-and-how-to-win-round-2-> [hereinafter *SPRINTING TO THE FINISH*] (describing the negative effect of New York's loss in the first round of the Race to the Top competition on public students, public schools, and the state budget).

49. See, e.g., Jennifer Medina, *State Looks at Doubling Cap on Charter Schools*, N.Y. TIMES, Jan. 16, 2010, at A16; James D. Merriman, *Look Who the "Cap" Is Keeping Out*, N.Y. POST (Apr. 21, 2010, 1:34 AM), http://www.nypost.com/p/news/opinion/opedcolumnists/look_who_the_cap_is_keeping_out_aY5KD5XSiu60YOd3uX3DBL; R.W., *A Great Day in Harlem*, ECONOMIST (Mar. 30, 2010, 1:22 AM), http://www.economist.com/blogs/democracyinamerica/2010/03/charter_schools (describing Governor David Patterson's support for lifting the charter school cap and describing New York's inability to secure federal funding in the first round of Race to the Top); Editorial, *The Week That Will Be*, N.Y. POST, May 24, 2010, http://www.nypost.com/p/news/opinion/editorials/the_week_that_will_be_0IbyWfUJW4pJTFccUS9ZzH.

50. N.Y. EDUC. LAW §§ 2850–2857 (McKinney 2013).

51. *Id.* § 2851.

52. *Id.* § 2852.

53. *Id.* § 2857.

54. *Id.* § 2851(3)(a). "In a city having a population of one million or more, the chancellor of any such school district shall be the charter entity." *Id.*

55. *Id.* § 2851(3)(b).

Board of Regents.⁵⁶ Charter schools are reauthorized every five years⁵⁷ contingent upon a contract requiring high student achievement.⁵⁸ If a charter school fails to demonstrate high achievement, its charter will not be reauthorized and the school will close.

The Charter Schools Act originally capped the number of charter schools in New York State at 100 schools.⁵⁹ In 2007, the state Legislature raised the charter school cap to 200, the same level under which New York's first Race to the Top application was considered.⁶⁰ After New York failed to secure federal funding under the first round of Race to the Top Grants, support for lifting the charter cap amplified.⁶¹ Although Governor David Paterson initially opposed raising the cap,⁶² he reconsidered his stance and proposed lifting the cap in January of 2010 to increase New York's chances of securing federal funding through Race to the Top.⁶³ On May 28, 2010, the New York State Legislature lifted the cap to 460 charter schools.⁶⁴ The legislation also made up to 130 new charters available for New York City.⁶⁵ New York implemented the new cap in time to meet the June 1, 2010 deadline for the second round of Race to the Top.⁶⁶

On August 24, 2010, the U.S. Department of Education (U.S. DOE) announced the winners of the second round of Race to the

56. *Id.* § 2851(3)(c).

57. *Id.* § 2851(4).

58. *Charter Schools*, N.Y.C. DEP'T OF EDUC., <http://schools.nyc.gov/community/planning/charters/default.htm> (last visited June 9, 2013).

59. N.Y.C. INDEP. BUDGET OFFICE, *supra* note 20, at 2.

60. *Id.*

61. See, e.g., DEMOCRATS FOR EDUC. REFORM, RACE SMARTER 2 (2010), available at <http://www.dfer.org/New%20York%20Race%20Smarter%20Brief.pdf>; James Merriman, *Why Charter Cap Should Be Lifted*, CRAIN'S N.Y. BUS., May 23, 2010, <http://www.crainsnewyork.com/article/20100523/SUB/305239990>; *Bill Clinton Says New York Charter Cap Should Be Lifted*, EDUC. WEEK (May 18, 2010, 4:01 PM), http://blogs.edweek.org/edweek/state_edwatch/2010/05/bill_clinton_says_new_york_charter_cap_should_be_lifted.html.

62. Brendan Scott & Yoav Gonen, *Gov's Charter Shock*, N.Y. POST, Oct. 27, 2009.

63. Medina, *supra* note 49.

64. N.Y. EDUC. LAW § 2852(9) (McKinney 2013); see also N.Y.S. ASSEMB. B. A11310 § 11 (2010), available at <http://assembly.state.ny.us/leg/?sh=printbill&bn=A11310&term=2009>.

65. EDUC. § 2852(9)(d)–(e); N.Y.S. ASSEMB. B. A11310 § 11 (2010).

66. EDUC. § 2852.

Top grants.⁶⁷ It declared New York as a winner and granted the state a budget not to exceed \$700 million.⁶⁸ Under the criterion of ensuring successful conditions for high-performing charter schools and other innovative schools, New York's score leapt to 36.6 out of 40 possible points.⁶⁹ The reviewers stated that the lift on the charter cap "extended [charter schools'] potential."⁷⁰ They further cited that the New York City School District, in which 64% of the state's charter schools are located, "actively provides many charter schools with space in public school buildings and also provides help in obtaining facilities."⁷¹ The decision to lift the charter cap not only aided the state in the short-term goal of receiving federal funding under Race to the Top, but also created the potential to radically alter New York's charter school landscape.⁷²

C. The Process for Allocating Space to Charter Schools in New York

The amendment of the New York Charter School Act in 2010 created the potential to nearly double the number of charter schools in New York City.⁷³ As the number of charter schools in the city continues to grow, the question of where to house these schools arises. New York Education Law Section 2853 governs the allocation of space to charter schools.⁷⁴ Section 2853(3)(a) provides:

A charter school may be located in part of an existing public school building, in space provided on a private work site, in a public building or in any other suitable location. Provided, however, before a charter school may be located in part of an existing public school building, the charter entity shall provide notice to the parents or guardians of the students then enrolled in the existing school building and shall hold a public hearing for purposes of discussing

67. Press Release, U.S. Dep't of Educ., Nine States and the District of Columbia Win Second Round Race to the Top Grants (Aug. 24, 2010), *available at* <http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants>.

68. *Id.*

69. U.S. DEP'T OF EDUC., RACE TO THE TOP PANEL REVIEW BY APPLICANT FOR NEW YORK, PHASE 2, at 5 (2010), *available at* <http://www2.ed.gov/programs/racetothetop/phase2-applications/comments/new-york.pdf>.

70. *Id.* at 25.

71. *Id.*

72. *See supra* notes 64–65 and accompanying text.

73. *See supra* note 65 and accompanying text (discussing provision of 130 new charters specifically for New York City).

74. *See generally* N.Y. EDUC. LAW § 2853 (McKinney 2013).

the location of the charter school. A charter school may own, lease or rent its space.⁷⁵

As the language of the statute—including the phrase “any other suitable location”—demonstrates, Section 2853(3)(a) enumerates a broad range of possible locations in which charter schools may be located. Nevertheless, the practical realities of available space and finances limit the possible locations in which new charter schools can open and thrive. Under New York State’s Charter Schools Law, there is no provision for direct public funding of the cost of school facilities.⁷⁶ Building or renting a private facility is often prohibitively expensive.⁷⁷ Banks often rate charter schools as high-risk enterprises and may charge them higher interest rates.⁷⁸ The risk that a school might be shut down after five years for poor performance can deter foundations and commercial lenders entirely from committing funds for charter schools to operate in private facilities.⁷⁹ Furthermore, when charter schools are located in private spaces, the schools pay their own lease obligations or other capital expenses, as well as the cost of janitorial services and utilities.⁸⁰

Co-location circumvents many of these challenges, which may be a primary reason why approximately two-thirds of the charter schools in New York City are currently housed in existing public school buildings.⁸¹ Charter schools located in New York City Department of Education (DOE) buildings avoid capital costs, and if charters share a DOE building with one or more traditional public schools, the DOE’s budget also absorbs the charter schools’ utilities and janitorial costs.⁸² From a financial perspective, it is clear that charter schools benefit

75. *Id.* § 2853(3)(a).

76. *See generally id.* § 2853; N.Y.C. INDEP. BUDGET OFFICE, *supra* note 20, at 5.

77. N.Y.C. INDEP. BUDGET OFFICE, *supra* note 20, at 5 (“[T]he high cost of land and construction in the City . . . creates a significant barrier to [charter schools’] establishment.”).

78. EDUC. SECTOR, GROWING PAINS: SCALING UP THE NATION’S BEST CHARTER SCHOOLS 7 (2009), *available at* http://www.educationsector.org/sites/default/files/publications/Growing_Pains.pdf.

79. *See supra* notes 44–45 and accompanying text; *see also* CIVIC BUILDERS, NEW YORK CITY CHARTER SCHOOLS: A REAL ESTATE PRIMER 2 (2004) (on file with author) (discussing the risks and expenses involved in building schools in New York City).

80. N.Y.C. INDEP. BUDGET OFFICE, *supra* note 20, at 5.

81. *See, e.g.*, N.Y.C. INDEP. BUDGET OFFICE, COMPARING THE LEVEL OF PUBLIC SUPPORT: CHARTER SCHOOLS VERSUS TRADITIONAL PUBLIC SCHOOLS 1 (2010), *available at* <http://www.ibo.nyc.ny.us/iboreports/charterschoolsfeb2010.pdf>.

82. *Id.* at 5.

from co-locating with traditional public schools rather than securing space in a private facility. Co-locations are not guaranteed to last, however; when charter schools are allowed to co-locate in district buildings, they do not attain a legal right to the space.⁸³ One potential repercussion of this fact is that charter schools cannot be certain that they will inhabit the same building from year to year and may need to spend considerable time and effort attempting to secure a new space.

New York Education Law Section 2853(3)(a-3) governs the process of co-locating charter schools with other schools.⁸⁴ Before a charter school may receive space in an existing public school building, the chancellor “shall identify which public school buildings may be subject to location or co-location, provide the rationale as to why such public school building is identified for location or co-location and shall make all such information publicly available.”⁸⁵ A co-location of a new or existing school, whether permanent or temporary, typically requires a building that is underutilized by at least 300 seats.⁸⁶ The law directs the chancellor to provide information to the community superintendent, the community district education council, and the school-based management team.⁸⁷

When the chancellor of schools proposes a significant change in school utilization, which includes co-location, he or she must prepare an Educational Impact Statement (EIS), which is subject to public filing, public voting, and a vote by the PEP.⁸⁸ The EIS must be filed

83. N.Y.C. CHARTER SCH. CTR, *UNEQUAL SHARES: THE SURPRISING FACTS ABOUT CHARTER SCHOOLS AND OVERCROWDING* 7 (2011), *available at* http://www.nyccharterschools.org/storage/documents/unequal_shares.pdf.

84. N.Y. EDUC. LAW § 2853(a-3) (McKinney 2013).

85. *Id.* § 2853(a-3)(1).

86. N.Y.C. DEP’T OF EDUC., *UNDERUTILIZED SPACE MEMORANDUM* 2 (2012), *available at* <http://schools.nyc.gov/NR/rdonlyres/6D8EA76A-82FA-4740-9ED1-66BCABEE8BFB/130053/UnderutilizedSpaceMemorandumUpdated0112191.pdf>.

87. EDUC. § 2853(a-3)(1).

88. *Id.* § 2590-h(2-a)(d). New York Education Law § 2590-b establishes the Board of Education of the City School District of the City of New York. EDUC. § 2590-b. This Board is commonly known as the Panel for Educational Policy, or PEP. *See* N.Y.C. DEP’T OF EDUC., *BYLAWS OF THE PANEL FOR EDUCATIONAL POLICY OF THE DEPARTMENT OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK* 1 (2009), *available at* <http://schools.nyc.gov/NR/rdonlyres/B432D059-6BFE-4198-8453-466FDE2B22D5/69835/PEPBylawsFinal91409.pdf>. The PEP is a thirteen-member body. *Id.* Each of the five borough presidents appoints one member, and the mayor appoints eight members. *Id.* Each member appointed by a Borough President is a resident of the same Borough that the president who appointed that member serves and is a parent of a child attending a public school in the City School District. *Id.* Each Mayoral appointee is a city resident, and two of the Mayoral appointees must be the parent of a child attending a public school in the

at least six months in advance of the first day of the school year.⁸⁹ The EIS must include information on the current and projected pupil enrollment of the affected school, the need for the school building, and the ramifications of the change in school utilization on the community;⁹⁰ the impacts of the proposed change in school utilization on affected students;⁹¹ and the availability of other schools in the affected community district to accommodate pupils following the change in school utilization.⁹² Furthermore, the law requires that the chancellor hold a joint public hearing no sooner than thirty days but no later than forty-five days after filing the EIS at the school subject to the co-location.⁹³

Once a public school building is selected for a proposed location or co-location, the law directs the chancellor to develop a building utilization plan (BUP), which is incorporated into the EIS.⁹⁴ The BUP must include the actual allocation and sharing of classroom and administrative space between the charter and non-charter schools;⁹⁵ a proposal for the collaborative usage of shared resources and spaces, including but not limited to cafeterias, libraries, gymnasiums, and recreational spaces including playgrounds;⁹⁶ a justification of the feasibility of the proposed allocations and schedules of classrooms, administrative spaces, and shared spaces;⁹⁷ building safety and security plans;⁹⁸ communication strategies to be used by the co-located schools;⁹⁹ and the collaborative decision-making strategies that the co-located schools will use.¹⁰⁰ Section 2853 also requires a “shared space committee” to be established in each public school building in which one or more charter schools are co-located with non-charter public schools.¹⁰¹ Shared space committees consist of the

City School District. *Id.* The Chancellor has a seat on the PEP but does not have the right to vote on matters before the panel. *Id.* at 2.

89. N.Y. EDUC. LAW § 2590-h(2-a)(c).

90. *Id.* § 2590-h(2-a)(b)(i).

91. *Id.* § 2590-h(2-a)(b)(ii).

92. *Id.* § 2590-h(2-a)(b)(iv).

93. *Id.* § 2590-h(2-a)(d).

94. *Id.*

95. *Id.* § 2853(3)(a-3)(2)(A).

96. *Id.* § 2853(3)(a-3)(2)(B).

97. *Id.* § 2853(3)(a-3)(2)(C).

98. *Id.* § 2853(3)(a-3)(2)(D).

99. *Id.* § 2853(3)(a-3)(2)(E).

100. *Id.* § 2853(3)(a-3)(2)(F).

101. *Id.* § 2853(3)(a-4).

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principal, a teacher, and a parent from each co-located school.¹⁰² These committees must schedule regular meetings, at least four times per school year, to review the implementation of the BUP.¹⁰³

New York City Chancellor's Regulation A-190 implements the foregoing provisions of New York Education Law within the New York City educational system.¹⁰⁴ A-190 also enumerates the procedures for public review and comment on the Chancellor's proposals for changes in school utilization.¹⁰⁵ When the Chancellor proposes the co-location of two or more schools, he or she prepares an EIS including the current and projected student enrollment; the prospective need for the building; the ramifications of the co-location upon the community; the initial costs and savings resulting from the change in utilization; the impact of the proposal on affected students; an outline of any proposed or potential use of the school building for other educational programs or administrative services; the effect of the co-location on personnel needs; the physical condition of the school building; the ability of other schools in the community district to accommodate students following the school closure or change in utilization; and information regarding the school's academic performance.¹⁰⁶

In any proposal to locate or co-locate a charter school in an existing public school building, A-190 further requires the EIS to include a rationale as to why the particular building has been identified for the location or co-location of the charter school.¹⁰⁷ The DOE uses the Enrollment-Capacity-Utilization Report (commonly referred to as the Blue Book) as the standard for assessing capacity within DOE buildings.¹⁰⁸ The NYC DOE Instructional Footprint is a document that sets forth the baseline number of rooms that should be allocated to a school based on the grade levels served by the school and number of classes per grade.¹⁰⁹ The Instructional Footprint is

102. *Id.*

103. *Id.*

104. N.Y.C. Dep't of Educ., Chancellor's Reg. No. A-190 (2010), *available at* <http://schools.nyc.gov/NR/rdonlyres/F67CF21A-7B6E-48BB-9696-A3D2438D8845/109597/A190FINAL.pdf>.

105. *Id.* § II.

106. *Id.* § II(A)(1)(a)–(k).

107. *Id.* § II(A)(2)(a)(i).

108. N.Y.C. DEP'T OF EDUC., INSTRUCTIONAL FOOTPRINTS 1 (consolidated version, 2011), *available at* http://schools.nyc.gov/NR/rdonlyres/78D715EA-EC50-4AD1-82D1-1CAC544F5D30/DOEFOOTPRINTSConsolidatedVersion2011_FINAL.pdf.

109. *See, e.g.*, N.Y.C. DEP'T OF EDUC., *supra* note 6, at 13.

meant to help school managers and staff with the efficient programming of space.¹¹⁰ Chancellor's Regulation A-190 provides that any space not allocated pursuant to the Instructional Footprint should be divided equitably among the co-located schools.¹¹¹ The DOE suggests that in co-location situations, the Instructional Footprint should provide a guideline for dividing space equitably.¹¹² To determine the equitable allocation of space, the DOE may consider factors such as the relative enrollments of the co-located schools, the instructional and programmatic needs of the co-located schools, and the physical location of the excess space within the building.¹¹³

Although these state and local laws and regulations provide guidelines for the division of space in co-located schools, they fail to adequately account for the ways in which schools actually use their space. The following Part will highlight some of the limitations of New York's charter school laws and regulations by examining the challenges that arise when charter schools in New York City co-locate in public school buildings.

II. THE CHALLENGES OF CHARTER SCHOOL CO-LOCATION

A. Allocating Space Fairly in Schools

As charter schools have proliferated in New York City, the growing tension between charter schools and traditional public schools over co-location has been described, perhaps less than subtly, as a "Middle East war."¹¹⁴ Advocates for charter schools argue that charter schools should be able to inhabit school spaces that are either under-utilized or not being used at all.¹¹⁵ Teachers and families of traditional public schools identified for co-location frequently complain that their buildings are overcrowded already,¹¹⁶ that they are

110. N.Y.C. DEP'T OF EDUC., *supra* note 108, at 1.

111. Chancellor's Reg. No. A-190 § II(A)(2)(a)(ii)(a).

112. N.Y.C. DEP'T OF EDUC., *supra* note 108, at 1.

113. Chancellor's Reg. No. A-190 § II(A)(2)(a)(ii)(a).

114. Jeff Coplon, *The Patron Saint (and Scourge) of Lost Schools*, N.Y. MAG. (Apr. 25, 2010), <http://nymag.com/news/features/65614>.

115. *See, e.g.,* *Steglich v. Bd. of Educ. of N.Y.C. (Steglich II)*, 929 N.Y.S.2d 686, 688 (Sup. Ct. 2011) (presenting the position of charter school supporters who argue that classrooms used for storing filing cabinets would be better suited for educating students).

116. *See, e.g., Public Comment Analysis: The Proposed Temporary Co-Location of a New Public Charter School, East Harlem Scholars Academy Charter School*

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unable to continue with plans to grow and expand,¹¹⁷ and that the concurrent growth of both the charter and public schools sharing the same space will push their school buildings far over capacity.¹¹⁸

Opponents of co-location also raise concerns over the discrete details of space allocation between schools. Teachers and parents of students in traditional public schools complain that the proposed allocation of space deprives their students of equal access to facilities,¹¹⁹ that schedules for daily activities like lunch and library time are erratic and unfair,¹²⁰ and that there is not sufficient space available for students requiring one-on-one services outside of the general classroom for special education, speech, and occupational therapy.¹²¹ Teachers in co-located traditional public schools and charter schools state that they must hold one-on-one sessions with students in hallways and stairwells because of a lack of instructional space.¹²²

(84MTBD), with Existing Schools Central Park East I (04M497), Central Park East High School (04M555), and J.H.S. 013 Jackie Robinson (04M013), N.Y.C. DEP'T OF EDUC. 2 (Mar. 22, 2011), [http://schools.nyc.gov/NR/rdonlyres/6AAE3AB0-8079-4ADD-A365-](http://schools.nyc.gov/NR/rdonlyres/6AAE3AB0-8079-4ADD-A365-9373FAB5D35A/101541/Analysis_of_Public_Comment_EHScholars_vfinal.pdf)

9373FAB5D35A/101541/Analysis_of_Public_Comment_EHScholars_vfinal.pdf [hereinafter *East Harlem Scholars Public Comments*] (asserting that there is already a strain on shared spaces in the school building and blaming the strain on poor planning by the DOE, and noting how students must eat lunch in their classrooms because of space constraints, while others must eat lunch at 10:30 a.m.).

117. *Id.* (arguing that the existing school, Central Park East I, should be allowed to expand to serve students through grade eight because of parent demand to have their children continue in the same environment, and stating that the co-location of East Harlem Scholars would preclude this expansion).

118. *See, e.g., Public Comment Analysis: The Proposed Re-Siting of Harlem Success Academy 1 Middle School Grades 5–8 and Co-Location with Existing Schools Wadleigh Secondary School (03M415) and Frederick Douglass Academy II (03M860), in Building M088, in 2012–2013*, N.Y.C. DEP'T OF EDUC. 3 (Jan. 31, 2011), [http://schools.nyc.gov/NR/rdonlyres/964086CE-D82A-4480-8E77-](http://schools.nyc.gov/NR/rdonlyres/964086CE-D82A-4480-8E77-C5516251AA56/98091/Analysis_of_Public_Comment_HSA1_Colo_vfinal.pdf)

C5516251AA56/98091/Analysis_of_Public_Comment_HSA1_Colo_vfinal.pdf (recording comments on the EIS's projection stating that the school building would be at a capacity of 112–114% with the re-siting, which would raise safety concerns).

119. *See infra* notes 152–64 and accompanying text.

120. *Id.*

121. *See, e.g., Public Comment Analysis: The Proposed Co-Location of Grades K–3 of KIPP S.T.A.R. Elementary Charter School (84M726) with Existing School P.S. 115 Alexander Humboldt (06M115) in Building M115*, N.Y.C. DEP'T OF EDUC. 4 (May 17, 2011), http://schools.nyc.gov/NR/rdonlyres/67072AE7-EFBC-41F0-A1C8-6A414F0F117F/105180/Analysis_of_Public_Comment_KIPP_ES_v11_final.pdf (reporting the comment of a special education teacher from P.S. 115 describing the necessity of having large spaces in which to work with special needs children).

122. *See, e.g., Revised Notice: The Proposed Expansion of the Co-Location of Democracy Prep Charter School (84M350) with Existing School P.S. 197 (05M197)*

Such concerns highlight one of the primary challenges of co-locating schools: under the current system, it is difficult to assess what space is actually available in a given school building and to subsequently determine the most appropriate and fair way to divide that space. Although DOE footprint data accounts for classroom space, it does not account for shared spaces such as the cafeteria, gymnasium, library, nurse's office, resource rooms, or Special Education Teacher Technology Specialist (SETTS) rooms.¹²³ DOE footprint data therefore cannot guarantee an accurate measure of available space in a building because it does not account for all of the space in a building.¹²⁴ This gap in information is especially striking given that the types of rooms for which the Instructional Footprint data fails to account are ones that address students' basic needs. Cafeterias must accommodate every student in a school on a daily basis, and nurses' offices and SETTTS rooms are crucial for providing basic health and special educational services. The Instructional Footprint also does not account fully for the extent to which schools utilize special functions classrooms such as art facilities, music rooms, and computer labs.¹²⁵ Instead, the Instructional Footprint groups these rooms into the category of "specialty rooms."¹²⁶ Therefore, the footprint data does not indicate the ways in which a school might use a classroom space for specific types of academic programming.

The ramifications of inadequate Instructional Footprint data impact the daily functioning of both charter and traditional public schools. To accommodate a large number of students in school cafeterias, some schools must stagger lunch periods throughout the day from 10:15 a.m. until 2:00 p.m.¹²⁷ Inadequate access to gym space prevents some schools from complying with both New York State and New York City physical education standards.¹²⁸ In addition, charter

John B. Russwurm in Building M197, N.Y.C. DEP'T OF EDUC. 3 (Apr. 27, 2011), http://schools.nyc.gov/NR/ronlyres/5A9EEDB8-0F4E-4783-992F-407738B86343/103773/PEP_Notice_M197_revised_427_vfinal.pdf (charter school campus director in a co-located school building noting that teachers at Democracy Prep charter school must hold small instructional sessions in the hallways, in front of bathrooms, and on stairwells).

123. N.Y.C. DEP'T OF EDUC., *supra* note 108, at 4.

124. *Id.*

125. *Id.* at 5–9 (stating that schools will be allocated full size classrooms for cluster and specialty rooms and naming art and music as examples of specialty rooms).

126. *Id.*

127. Manners & Ramirez, *supra* note 6, at 10.

128. *See id.* (discussing the example of P.S. 308 in Brooklyn, where even prior to its co-location with Teaching Firms of America Charter School, P.S. 308 was unable to

schools often opt to assign more students per classroom than traditional public schools do.¹²⁹ The inaccuracy of the Instructional Footprint data can potentially result in overcrowding and the imbalanced allocation of resources.

B. Broader Systemic Concerns

Supporters of traditional public schools also argue that allowing charter schools to co-locate in public school buildings disadvantages students throughout the traditional public schools within the school district, and not just in the school building in which the charter school operates.¹³⁰ Their rationale is that charter schools generally take applicants both from within the district in which a charter school is located as well as from other community school districts.¹³¹ One possible criticism to this approach is that allowing students from outside districts to enroll in a charter school translates into fewer options for neighborhood children within those districts, especially if those children do not succeed in charter school lotteries. This criticism is not entirely warranted, however, because charter schools are required by law to give priority to two groups of students in

provide the required allotment of gym time to students in grades K–5 due to a lack of space). New York State law provides that all students above the age of 8 must participate in physical education. N.Y. EDUC. LAW § 803(1) (McKinney 2013). New York City regulations provide that K-3 students must participate in gym on a daily basis and Grade 4–6 students must generally participate in gym at least three times per week. N.Y. COMP. CODES R. & REGS. tit. 8, § 135.4(c)(2)(i)(a)–(b) (2012), available at <http://www.dos.ny.gov/info/nycrr.html>.

129. See, e.g., Ken Hirsh, *Class Size and Charter Schools*, GOTHAM SCHS. (Feb. 24, 2009, 11:09 AM), <http://gothamschools.org/2009/02/24/class-size-and-charter-schools/> (discussing the prevalence of arrangements in New York City charter schools in which two teachers co-teach up to thirty children in a classroom); Eva Moskowitz, *The Cost of Small Class Size*, WASH. POST (Mar. 27, 2011), http://www.washingtonpost.com/opinions/the-cost-of-small-class-size/2011/03/03/AFPgSkkB_story.html (contrasting the larger class sizes in her network of charter schools against smaller class sizes in New York City public schools).

130. See, e.g., *Further Amended Public Comment Analysis: The Revised Proposed Co-Location of a New Public Charter School, Success Academy Charter School, with Existing Schools in the Brandeis Educational Complex*, N.Y.C. DEP'T OF EDUC 8 (2011), available at http://schools.nyc.gov/NR/ronlyres/26767179-A349-4E3D-B4E1-05B87B03ECD8/107279/AmendedPublicCommentAnalysis_2ndAMENDED_Monday_FIN.pdf.

131. See, e.g., *Our Schools*, SUCCESS ACAD. CHARTER SCHS., <http://www.successacademies.org/page.cfm?p=25> (stating that applicants can apply to any or all of the Network's charter schools, but that in-district students receive priority); *Frequently Asked Questions About Public Charter Schools*, UNCOMMON SCHS., <http://www.uncommonschoos.org/faq-what-is-charter-school> (stating that students from outside the school district may be accepted).

admissions lotteries: siblings of current students and residents of the district in which a school will be located.¹³² Nevertheless, it is possible that a number of district residents might opt out of entering the lottery for a particular charter school, allowing a larger number of out-of-district students to enter the district and increase the burden on that district's resources.

Section 2853 requires public hearings for community members to air their concerns about these and other issues,¹³³ and these hearings receive a mix of support and criticism. On one hand, public hearings provide a forum for community members to express their opinions about co-locations before the PEP. Some individuals complain, however, that the PEP conducts these hearings out of mere formality and that the input that members of the public give at these hearings has little effect on the co-location approval process.¹³⁴ Critics point to the quick turnaround time between hearings and decisions and the disjunction between high proportions of negative commentary and the ultimate approval of the co-location as evidence that public comments are heard but not truly considered.¹³⁵ Others complain that there is not enough advance notice of the public hearings and thus not enough opportunity for interested members of the public to attend these hearings and to voice their opinions.¹³⁶ In some neighborhoods with major populations of non-English speakers, the advance notice of the public hearings sometimes is not published in some of the most predominately-spoken languages in these neighborhoods¹³⁷ or is not made available until days before the public hearing takes place.¹³⁸ Although there is high demand for charter schools in New York City, there is also vocal opposition to their expansion. The following

132. N.Y. EDUC. LAW § 2854(2)(b) (McKinney 2013).

133. *Id.* § 2853(3)(a).

134. *See, e.g., Public Comment Analysis: The Proposed Re-Siting and Co-Location of an Existing Public Charter School, Explore Charter School, with an Existing Middle School, M.S. 002, and a District 75 School in Building K002*, N.Y.C. DEP'T OF EDUC. 17-18 (2011), available at http://schools.nyc.gov/NR/ronlyres/D3734369-2F2B-4D9F-84CF-107DD37FA50C/0/Analysis_of_Public_Comment_Explore_vfinal.pdf [hereinafter *Explore Charter School Public Comment*].

135. *Id.*

136. *See id.* at 18.

137. *See id.* at 6 (stating that multiple commenters complained that the documents for the proposed co-location should have been translated into Arabic in addition to Spanish and Haitian Creole).

138. *Id.*

section will examine the tensions that arise from this dynamic through a discussion of recent disputes over charter school co-location.

C. Recent Disputes over Co-Location

As charter schools have gained more traction as an educational option in New York City, individuals and groups on both sides of the debate have increased their advocacy for their respective positions on charter school expansion. In August 2011, Advocates for Children, a nonprofit educational advocacy organization in New York, published a guide on co-location to assist public school parents with challenging co-location decisions favoring charter schools.¹³⁹ This guide includes step-by-step instructions on how to submit comments to the DOE, how to file an appeal to the New York State Education Commissioner after the PEP has voted on a co-location, and how to file an action in state court against the DOE.¹⁴⁰ On the pro-charter side, the New York City Charter School Center released a report in October of 2011 that provided data indicating that there is more crowding and a less equitable distribution of resources per pupil in school buildings *without* co-location than in schools with co-location.¹⁴¹

It is unsurprising that advocates on both sides of the debate have grown more vocal about the detriments and benefits of charter school co-location respectively and have made such resources as those mentioned above widely available to the public. Several recent examples of disputes over co-location illustrate how the issue has become more widely debated as charter schools continue to develop in neighborhoods across New York City. This section will discuss the examples of the co-location of P.S. 9 and Brooklyn East Collegiate Charter School in Brooklyn and the co-location of Upper West Success Academy Charter School with four high schools at the Brandeis Educational Complex in the Upper West Side of Manhattan. It will also highlight the continuing examples of persistent—yet to date, unsuccessful—efforts to block co-location in public schools throughout New York City.

139. See ADVOCATES FOR CHILDREN, THE LEGAL REQUIREMENTS FOR SCHOOL CO-LOCATION IN NEW YORK CITY (2011), *available at* http://www.advocatesforchildren.org/sites/default/files/library/fact_sheet_2011.pdf?pt=1.

140. *Id.*

141. See *Unequal Shares*, *supra* note 83, at 2.

1. *P.S. 9 and Brooklyn East Collegiate Charter School*

P.S. 9 is a traditional public school in Community School District 13 in Brooklyn that serves grades K–5 and offers three sections of pre-kindergarten.¹⁴² P.S. 9 shares its building with M.S. 571, a middle school that historically has served grades 6, 7, and 8.¹⁴³ In 2011, the DOE proposed to phase out M.S. 571 due to poor performance.¹⁴⁴ Community members and P.S. 9 administrators hoped to use the additional space to add three grades to expand P.S. 9 to a K–8 school.¹⁴⁵ At the same time, the DOE identified the building as a potential site for co-location with Brooklyn East Collegiate Charter School (BECCS),¹⁴⁶ a middle school that is part of the Uncommon Schools charter network.¹⁴⁷ At the time of the proposal, BECCS was already serving students in grade 5 in a temporary location and intended to expand to serve grades 5–8 by adding one grade level per year until it reached full capacity.¹⁴⁸

BECCS had faced opposition to co-location in the past: in the 2009-10 school year, BECCS was approved by the State University of New York's Charter School Institute to open a public charter school in District 23.¹⁴⁹ A lawsuit blocked BECCS from being sited in that district,¹⁵⁰ and so BECCS was temporarily sited in Building K434 in District 17.¹⁵¹ The temporary space was not sufficiently large to allow

142. *The Revised Proposed Re-Siting and Co-Location of Brooklyn East Collegiate Charter School (84K780) with Existing Schools P.S. 9 (13K009) and M.S. 571 (13K571) in Building K009*, N.Y.C. DEP'T OF EDUC. 1 (2011), available at http://schools.nyc.gov/NR/rdonlyres/67072AE7-EFBC-41F0-A1C8-6A414F0F117F/102751/PEP_Notice_MS571_Colocation_amendedBUP_vfinal.pdf [hereinafter *P.S. 9 Revised Notice*].

143. *Id.*

144. *Proposed Phase-Out and Replacement Scenario for M.S. 571 the Bergen Upper School*, N.Y.C. DEP'T OF EDUC. (Jan. 21, 2011), <http://schools.nyc.gov/community/planning/changes/brooklyn/MS571>.

145. *P.S. 9 Revised Notice*, *supra* note 142, at 4, 7 (citing multiple commenters from the P.S. 9 community asking for time and space for P.S. 9 to expand its grades and enrollment).

146. *Notice: The Proposed Phase-Out of M.S. 571, The Bergen Upper School*, NYC DEP'T OF EDUC., 1 (2010), available at http://schools.nyc.gov/NR/rdonlyres/CDF11959-252C-4EA1-8F27-73F2E65A2091/95278/PEP_Notice_MS571_vfinal.pdf [hereinafter *M.S. 571 Proposed Phase-Out*].

147. *See Brooklyn East Collegiate*, UNCOMMON SCHS., <http://brooklyneast.collegiate.uncommonschools.org/> (last visited June 24, 2013).

148. N.Y.C. DEP'T OF EDUC., *supra* note 6, at 2.

149. *Id.*

150. *See id.*

151. N.Y.C. DEP'T OF EDUC., *supra* note 6, at 2.

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BECCS to grow to its intended scale.¹⁵² The EIS for the proposed co-location with P.S. 9 noted that the building that P.S. 9 and M.S. 571 inhabited, Building K009, had the target capacity to serve 1,192 students and that the building actually enrolled only 713 students, yielding a target building utilization rate of only 63%.¹⁵³ The DOE estimated that once M.S. 571 had completed its phase-out and BECCS completed its phase-in, the building would serve approximately 950–1,000 total students, yielding a building utilization rate of 84%.¹⁵⁴

Opponents, mainly parents of P.S. 9 students, protested the co-location.¹⁵⁵ Families of P.S. 9 complained of the DOE's failure to engage the school community in the co-location process,¹⁵⁶ and the DOE's analysis of the joint public hearing noted that "several hundred" of the parents who came to the hearing were opposed to the co-location proposal.¹⁵⁷ One commenter claimed that the co-location process was rushed for no apparent reason and questioned the accuracy of the EIS, which had been subject to "eleventh hour changes."¹⁵⁸ Opponents to the co-location also posited a number of potential ramifications that the co-location would have on the P.S. 9 community, down to crucial everyday details. For instance, one commenter noted that students at P.S. 9 would be unable to use the bathrooms near their classrooms during the times of the day when the middle school students from BECCS were eating lunch in the nearby cafeteria.¹⁵⁹ Another commenter voiced that it would be difficult to coordinate the schedules and necessities of three schools in the K009 building while M.S. 571 phased out and raised concerns about

152. *Id.*

153. *M.S. 571 Proposed Phase-Out*, *supra* note 146, at 1.

154. *Id.* at 2.

155. *See, e.g.*, Ivette Feliciano, *Charter School Protest*, YOUTUBE (Feb. 4, 2011), <https://www.youtube.com/watch?v=ZUEfrSeB0K4> (interviewing a group of P.S. 9 parents protesting the co-location of BECCS with P.S. 9).

156. *See Public Comment Analysis: The Proposed Re-Siting and Co-Location of Brooklyn East Collegiate Charter School (84K780) with Existing Schools P.S. 9 (13K009) and M.S. 571(13K571) in Building K009*, N.Y.C. DEP'T OF EDUC. 3 (Feb. 2, 2011), http://schools.nyc.gov/NR/rdonlyres/71C1BD24-546A-46B1-BDA8-A8456D8B5D92/0/Analysis_of_Public_Comment_K571_Replacement_vfinal.pdf [hereinafter *P.S. 9 Public Comment*].

157. *Id.* at 7.

158. *Id.* at 3–4.

159. *Id.* at 5.

coordinating lunch periods, given the effort to keep all of the schools separate.¹⁶⁰

Other commenters asked why the EIS did not take P.S. 9's projected growth into account.¹⁶¹ At the time of the public hearing, 120 families with children entering kindergarten in the upcoming year were zoned for P.S. 9, and 104 of those families had already submitted their applications for kindergarten.¹⁶² The EIS, however, planned to cap fifth grade enrollment at eighty-five students.¹⁶³ By allotting only eighty-five slots to fifth grade, the EIS failed to account for the possibility of serving up to 120 fifth grade students at P.S. 9 in 2015, or perhaps even more if additional families moved into the district. Such discrepancies could substantially distort the accuracy of the EIS and therefore its efficacy in helping to allocate space.

The EIS also contained several errors that impeded the fair allocation of resources. For example, 275 minutes of P.S. 9's weekly library time were scheduled for mornings before the school was even open.¹⁶⁴ These morning library periods totaled about 17% of the total library time allotted to the school,¹⁶⁵ even though students would not be at the school during this time to use the library. The EIS also erroneously reflected that there were two gymnasiums in the school building, when in reality there was only one.¹⁶⁶ Nevertheless, the EIS was used to inform the PEP's decision on whether BECCS should co-locate with P.S. 9.

Despite the widespread opposition to the co-location of BECCS with P.S. 9 and M.S. 571 and the extensive confusion over the details of the EIS, the PEP ultimately approved the co-location on February 3, 2011.¹⁶⁷ A group of parents appealed the decision to the Commissioner of the State Education Department.¹⁶⁸ In what is now

160. *Id.*

161. *Id.* at 6.

162. *Id.* at 5.

163. *Id.*

164. See, e.g., Patrick Wall, *Parents Debate City's P.S. 9 Co-Location Before Final Vote*, PROSPECT HEIGHTS PATCH, (May 14, 2011, 11:53 AM), <http://prospectheights.patch.com/articles/parents-debate-citys-ps-9-co-location-plan-before-final-vote>.

165. *Id.*

166. N.Y.C. DEP'T OF EDUC., *supra* note 6, at 2.

167. *P.S. 9 Revised Notice*, *supra* note 142, at 1.

168. Espinet, Decision No. 16,212 (N.Y. Comm'r of Educ. Mar. 31, 2011), *available at* <http://www.counsel.nysed.gov/Decisions/volume50/d16212.htm>.

known as the “Espinete Decision,”¹⁶⁹ the Commissioner annulled the PEP’s approval of the co-location, noting that the DOE failed to provide a justification of the feasibility of the proposed allocations and schedules as New York Education Law Section 2853(3)(a-3) requires.¹⁷⁰ The Commissioner also underscored that Section 2853(3)(a-3)(C) specifically requires an EIS to justify “how such proposed allocations and shared usage would result in an equitable or comparable use of such public school building” and that the DOE had failed to do so.¹⁷¹ The annulment prohibited the DOE from proceeding with the co-location until the DOE complied with the Commissioner’s Order and Section 2853(3)(a-3)(2)(C) by preparing a BUP consistent with the Commissioner’s decision and the statute.¹⁷²

On April 8, 2011, the DOE published a revised EIS and revised BUP.¹⁷³ The revised EIS included additional information related to the use of shared spaces and the proposed shared space plan.¹⁷⁴ The DOE revised the BUP to adjust room allocations to reflect the total full-size, half-size and quarter size rooms in the building; corrected the application of the DOE Instructional footprint for the 2010-2011 school year; adjusted the proposed shared space schedule and clarified the rationale for the amount of time that each co-located school is allocated; and corrected the previous inaccuracy about the number of gymnasiums in the building.¹⁷⁵ In light of these revisions, the PEP approved the co-location of BECCS on May 18, 2011.¹⁷⁶ Parents from P.S. 9 appealed to the State Commissioner of Education once more, but the Commissioner rejected that appeal on July 20, 2011.¹⁷⁷ Although the parents of P.S. 9 were ultimately unsuccessful

169. See Philissa Cramer, *After Early Win, P.S. 9 Parents Lose Bid to Keep Charter School Out*, GOTHAM SCHOOLS (July 20, 2011, 1:55 PM), <http://gothamschools.org/2011/07/20/after-early-win-ps-9-parents-lose-bid-to-keep-charter-school-out/>.

170. Espinete, Decision No. 16,212, at 15 (N.Y. Comm’r of Educ. Mar. 31, 2011), available at <http://www.counsel.nysed.gov/Decisions/volume50/d16212.htm>.

171. *Id.* (citing NEW YORK EDUC. LAW § 2853(3)(a-3)).

172. *Id.* at 16.

173. N.Y.C. DEP’T OF EDUC., *supra* note 6, at 1.

174. *Id.*

175. *Id.*

176. *Resolution Regarding Approval of the Revised Proposed Re-siting and Co-Location of Brooklyn East Collegiate Charter School (84K780) with Existing Schools P.S. 9 Teunis Bergen (13K009) and M.S. 571 The Bergen Upper School (13K571) in Building K009*, N.Y.C. DEP’T OF EDUC., 3 (2011), available at http://schools.nyc.gov/NR/ronlyres/BE6270BE-4024-45F9-B05C-7A864382914C/105290/RESO_RevisedBECCoLo.pdf.

177. Cramer, *supra* note 169.

in their venture to keep a charter school out of their building, their first successful appeal to the state moved other groups at other traditional public schools facing co-location to file similar appeals.¹⁷⁸

2. *Success Charter Network and the Brandeis Educational Complex*

Success Charter Network operates fourteen charter schools in Manhattan, the Bronx, and Brooklyn.¹⁷⁹ In the fall of 2010, the State University of New York approved Success Charter Network's application to open a new public elementary charter school in Community School District 3 in the Upper West Side of Manhattan.¹⁸⁰ The DOE proposed to place the new charter, Upper West Success Academy, in the Brandeis Educational Complex at 145 West 84th Street.¹⁸¹ At the time of the proposal, the Brandeis Educational Complex housed five public high schools but was identified as an under-utilized building because it had more than three hundred seats available and because one of the existing schools, Brandeis High School, was being phased out.¹⁸² The charter school, Upper West Success Academy, would begin with 188 students in grades K–1 and would add one grade of eighty-four students each year until it reached full K–5 capacity in the 2015-2016 school year, serving a total of 481 students.¹⁸³ Combined with the high schools, the total enrollment at the Brandeis Campus at full scale would be approximately 2,000–2,100 students, putting the building at approximately 93–98% utilization.¹⁸⁴

The proposed co-location of the Success Charter School with the high schools at the Brandeis Educational Complex generated broad dissent in the surrounding community. Over three hundred members

178. *Id.* (citing appeals by opponents to the co-location of Coney Island Preparatory Charter School and Explore Charter School with traditional public schools).

179. *Our Schools*, SUCCESS ACAD. CHARTER SCHS., <http://www.successacademies.org/page.cfm?p=4> (last visited June 12, 2013).

180. *Educational Impact Statement: The Proposed Co-Location of a New Public Charter School Success Academy Charter School with Existing Schools in the Brandeis Educational Complex*, N.Y.C. DEP'T OF EDUC. 1 (Dec. 17, 2010), <http://schools.nyc.gov/NR/rdonlyres/964086CE-D82A-4480-8E77-C5516251AA56/95176/EISSA8.pdf> [hereinafter *Brandeis Educational Complex EIS*].

181. *Id.*

182. *Id.*

183. *Id.* at 2

184. *Id.*

of the public attended the joint public hearing on the co-location on January 25, 2011.¹⁸⁵ The statements of those in attendance overwhelmingly opposed the proposal.¹⁸⁶ Throughout the public comment period, the DOE received a total of 313 written and verbal submissions.¹⁸⁷ Three hundred and three of the submissions opposed the co-location, while ten supported the co-location.¹⁸⁸ Nevertheless, the PEP voted to approve the proposal on February 1, 2011.¹⁸⁹

The parents of children attending three of the five existing high schools in the Brandeis campus brought an Article 78 proceeding challenging the PEP's vote.¹⁹⁰ Success Academy Charter Schools and the parents of District 3 children who had been selected by lottery to attend kindergarten at Upper West Success Academy moved to intervene in the lawsuit.¹⁹¹ These children were otherwise zoned to attend a public elementary school that had received a grade of a "D" or "F" for student performance for the 2009-2010 school year.¹⁹² The plaintiffs argued that, because co-location constitutes a significant change in utilization, the Chancellor would have had to prepare an EIS and make it publicly available at least six months before the first day of school.¹⁹³ Because less than four months remained before the beginning of the 2011-2012 school year, the proposed intervenors argued that it would be too late to try to co-locate in another public school building.¹⁹⁴

The plaintiffs argued that the movants lacked standing to intervene and that the PEP vote approving the co-location of Upper West Success Academy in the Brandeis campus did not vest in the charter school any right to co-locate in the Brandeis campus.¹⁹⁵ The petitioners further cited New York Education Law Section 2853(3)(a), which permits a charter school to be located "on a private

185. MANNERS & RAMIREZ, *supra* note 6, at 15.

186. *Id.*

187. *Id.* at 16.

188. *Id.*

189. *Minutes of Action, Public Meeting of the Panel for Educational Policy*, N.Y.C. DEP'T EDUC. (Feb. 1, 2011), <http://schools.nyc.gov/NR/rdonlyres/02AA7F36-EB67-4EBD-A1E0-569A4EEB4AB4/98724/moa2112.pdf>.

190. *Steglich v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y. (Steglich I)*, No. 104300/11, 2011 WL 2535054 (N.Y. Sup. Ct. May 20, 2011).

191. *Id.* at *1

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at *2.

work site, in a public building, or in any suitable location” and which does not require advance notice.¹⁹⁶ The petitioners further argued that the Success Charter Network, the charter management organization that operates the Success Academy Charter Schools,¹⁹⁷ had sufficient funds available to fund a private space and that the school therefore could find an alternative location in the Upper West Side.¹⁹⁸ Ultimately, the DOE abandoned the original PEP vote and released a new EIS.¹⁹⁹

A public hearing on the new EIS was held on May 26, 2011.²⁰⁰ The parents, politicians, and community members who spoke at the public hearing raised a variety of concerns about the proposed co-location as well as about the co-location process in general. A representative from the office of New York State Assemblyman Daniel O'Donnell raised the concern that existing New York City Department of Education policies did not adequately incorporate public comment.²⁰¹ Others decried the fact that the charter school would inhabit District 3 instructional space while serving a significant number of students who did not reside within the already-overcrowded district.²⁰² Another speaker argued that it would be acceptable to house a charter school within the Brandeis Complex and that the real issue was that it was inappropriate to place elementary school students in a complex that otherwise served high school-aged students.²⁰³

196. *Id.*

197. Charter management organizations (CMOs) are nonprofit entities that directly manage public charter schools. See ROBIN LAKE ET AL., CTR. ON REINVENTING PUB. EDUC., THE NATIONAL STUDY OF CHARTER MANAGEMENT ORGANIZATION (CMO) EFFECTIVENESS: REPORT ON INTERIM FINDINGS 3 (2010), available at <http://www.crpe.org/publications/national-study-charter-management-organization-cmo-effectiveness-report-interim>.

198. *Steglich I*, 2011 WL 2535054, at *2.

199. See generally *Revised Educational Impact Statement: The Proposed Co-Location of a New Public Charter School, Success Academy Charter School, with Existing Schools in the Brandeis Educational Complex*, N.Y.C. DEP'T OF EDUC. (2011), available at <http://schools.nyc.gov/NR/rdonlyres/FEF5E610-2243-4DCB-A8B9-E732FC6D60F4/0/REVISEDEISSA8K5vfinal.pdf>.

200. See STATE UNIV. OF N.Y. CHARTER SCH. INST., PUBLIC HEARING SUMMARY FOR MAY 26, 2011 (2011), available at <http://www.newyorkcharters.org/documents/PublicHearing-UWSCS.pdf> [hereinafter SACS PUBLIC HEARING SUMMARY FOR MAY 26, 2011].

201. *Id.* at 2.

202. *Id.* For example, Noah Gotbaum, president of Community Education Council 3, argued that there are already two existing Success Charter Network schools in District 3 that do not serve District 3 families. *Id.*

203. *Id.*

Multiple community members who did not attend the hearing wrote in to argue that the available space should be used to avoid district overcrowding and that there was a greater need in the community for a new high-quality high school rather than another elementary school.²⁰⁴ Teachers and staff members from the high schools at the Brandeis Complex attested that there was already insufficient space in the complex; school counselors stated that they needed to meet with students in stairwells or corners to provide them with special educational services.²⁰⁵ Two other individuals noted that the co-location would deprive high school students of access to science laboratories and art studios.²⁰⁶ In a written comment, one opponent to the co-location expressed that one of the high schools in the Brandeis Complex already had a waiting list and suggested that the extra space be used to provide more seats to high school students.²⁰⁷ Notwithstanding these oppositions, the PEP voted to approve the co-location on June 27, 2011.²⁰⁸

The same group of parents who originally sought to enjoin the co-location of Upper West Success Academy at the Brandeis Educational Complex²⁰⁹ filed a second lawsuit on June 30, 2011, seeking to have the June PEP vote declared a nullity.²¹⁰ The plaintiffs argued that the timing of the revised EIS and BUP were improper because they were filed less than six months before the start of the school year; that the DOE lacked the authority to revise the EIS and BUP after the February PEP vote; that the DOE failed to comply with notice requirements; and that the EIS impermissibly included a school not mentioned or addressed in the original EIS.²¹¹

The defendants argued that the court lacked jurisdiction over the action because the Commissioner of the State Education Department had exclusive original jurisdiction over the issue, and that the plaintiffs thus failed to exhaust their administrative remedies under New York Education Law.²¹² On the merits, the defendants argued that they had a right to revise their EIS and BUP, that these

204. *Id.*

205. *Id.*

206. *Id.* at 3.

207. *Id.*

208. *Steglich II*, 929 N.Y.S.2d 686, 687–88 (Sup. Ct. 2011).

209. *See supra* notes 178–87 and accompanying text.

210. *Steglich II*, 929 N.Y.S.2d 686, 688 (Sup. Ct. 2011).

211. *Id.*

212. *Id.*

documents were timely brought, and that they had complied with the requisite notice requirements despite the fact that a Spanish version of the notice of hearing appeared at a later date than the original notice.²¹³ Judge Paul Feinman dismissed the action without reaching the merits, holding that the Commissioner of the State Education Department should have heard plaintiffs' claims in the first instance.²¹⁴

In a separate lawsuit, the United Federation of Teachers (UFT) and the NAACP sued the PEP and Dennis Walcott, New York City's Chancellor of Schools, in an effort to enjoin the phasing out of certain designated schools within the New York City School System and asking that certain charter schools be enjoined permanently from being co-located in existing public schools.²¹⁵ Upper West Success Academy was one of the schools that the lawsuit sought to enjoin from co-locating.²¹⁶ Judge Feinman denied the plaintiffs' motion for a preliminary injunction, holding that given the many sharply disputed factual issues in the case, the plaintiffs failed to show a likelihood of success on the merits of their claims.²¹⁷ Judge Feinman distinguished the Espinet decision,²¹⁸ noting that all but one BUP for the co-locations that the plaintiffs sought to enjoin provided sufficient justification for the allocations of space between co-located schools.²¹⁹ He further noted that halting the co-locations of the charter schools in question would cause the charter schools hardship in attempting to find space in time for the new school year, and he was unconvinced that "the equities tip[ped] in either direction" regarding the fair allocation of space.²²⁰ In spite of the community resistance and legal challenges that it faced, Upper West Success Academy opened its doors in the Brandeis Educational Complex on August 24, 2011.²²¹

213. *Id.*

214. *Id.* at 689

215. *Mulgrew v. Bd of Educ. of the City Sch. Dist. of the City of N.Y.*, 927 N.Y.S.2d 855 (Sup. Ct. 2011).

216. *Id.*

217. *Id.* at 867–68.

218. *See supra* note 156 and accompanying text.

219. *Mulgrew*, 927 N.Y.S.2d at 866.

220. *Id.* at 867.

221. Jessica Bell, *A Quiet First Day for an Upper West Side Charter School*, N.Y. TIMES CITY ROOM (Aug. 24, 2011, 4:59 PM), <http://cityroom.blogs.nytimes.com/2011/08/24/a-quiet-first-day-for-upper-west-side-charter-school/>.

3. *Additional Litigation*

In late 2011, the New York City Parents Union, Class Size Matters, New York Communities for Change, and a group of individuals filed suit against the BOE, Chancellor Dennis Walcott, and a group of eighteen New York City charter schools.²²² The plaintiffs moved, by order to show cause, for a preliminary injunction enjoining the BOE from “failing to collect the proper rent and cost of charter schools using public school buildings” and allegedly causing a loss in opportunities for public school children.²²³ The plaintiffs relied on Education Law Section 2853(4)(c), which states that “a charter school may contract with a school district . . . for the use of a school building and grounds, the operation and maintenance thereof. Any such contract shall provide for such services and facilities at cost.”²²⁴ Accordingly, the plaintiffs claimed that the BOE failed to collect substantial sums of money from the charter schools to the detriment of public schools.²²⁵

The defendant BOE and charter schools argued that the charter schools in question did not receive their space in public schools through a contract; rather, the BOE merely gave the space to the charter schools, so the charter schools did not need to pay costs for the space.²²⁶ Judge Feinman denied plaintiffs’ motion for a preliminary injunction, noting that at this early stage, plaintiffs’ claims were based on a merely speculative harm.²²⁷ He explained that a preliminary injunction was inappropriate at the time of the ruling because it would be inequitable to disturb the operations of charter schools in the middle of the school year because of the large potential to disrupt the learning of a significant number of students.²²⁸ Importantly, however, Judge Feinman emphasized that he did not reach the merits of plaintiffs’ claims because of the timing of the lawsuit.²²⁹ Hence, the underlying issue remains unresolved, and the dispute likely will resurface.

222. N.Y.C. Parents Union v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y., No. 108538/11 (N.Y. Sup. Ct. Dec. 28, 2011).

223. *Id.* at 3.

224. *Id.*

225. *Id.*

226. *Id.* at 3–4.

227. *Id.* at 5.

228. *Id.*

229. *Id.*

On February 8, 2012, fifteen public school parents represented by Advocates for Justice, a New York-based public interest law firm, filed a lawsuit to prevent Success Academy Charter Schools from moving into their neighborhood of Cobble Hill, Brooklyn,²³⁰ which was slated to open in Community School District 15 in the fall of 2012.²³¹ The State University of New York, however, had approved the school's charter for operation in Districts 13 and 14, not in District 15, and it was in those two districts that the proposed school held community hearings.²³² One parent leader at the School for International Studies, one of the existing schools with which the new Success Academy Charter School will share its space, emphasized that "if [SACS] had followed the rules and bothered to ask parents and the community in our building and in District 15 for input, this co-location would not be happening next year."²³³ Ultimately, Brooklyn Success Academy opened in the fall of 2012.

4. *Looking Ahead: Mayoral Candidates' Stances on Charter School Co-Location*

At the time this Note was written, Mayor Michael Bloomberg, who has been a strong supporter of the expansion of charter schools, was nearing the end of his third and final term as Mayor of New York City.²³⁴ New York City's public schools operate under a system of mayoral control, meaning that the mayor is the ultimate authority on the operations and policies of the public school system.²³⁵ It is through this system of control that Mayor Bloomberg has encouraged the growth of charter schools.²³⁶ Education policy is almost certain to

230. Geoff Decker, *For Second Year in a Row, a New Moskowitz School Is Being Sued*, GOTHAM SCHS. (Feb. 8, 2012, 6:40 PM), <http://gothamschools.org/2012/02/08/for-second-year-in-a-row-a-new-moskowitz-school-is-being-sued/>.

231. *The Amended Proposed Co-Location of Brooklyn Success Academy Charter School 3 with Existing Schools Brooklyn School for Global Studies, School for International Studies, and a District 75 School, P.S. 368 in Building K293 Beginning in 2012-2013*, N.Y.C. DEP'T OF EDUC. (2011), available at http://schools.nyc.gov/NR/rdonlyres/82AEAD19-9AE8-44D9-98F1-CB981F32556E/115330/K293_PEPAmendedloc_FINAL1.pdf.

232. Decker, *supra* note 230.

233. *Id.*

234. See Cramer, *supra* note 27.

235. Jennifer Medina, *N.Y. Senate Renews Mayor's Power to Run Schools*, N.Y. TIMES, Aug. 6, 2009, <http://www.nytimes.com/2009/08/07/nyregion/07control.html>.

236. *See id.*

be a leading issue in the upcoming election.²³⁷ Moreover, there are currently over one hundred thousand parents of charter school students in New York City, and these parents could comprise a significant voting bloc.²³⁸ Three of the current democratic candidates for mayor, Public Advocate Bill de Blasio, Comptroller John Liu, and former Comptroller Bill Thompson, have indicated that they will not support co-locating charter schools to the extent that Bloomberg has during his administration.²³⁹ The current frontrunner, New York City Council Speaker Christine Quinn,²⁴⁰ has taken a more reserved stance on the issue, saying that she would like to reform the policies but not end them outright.²⁴¹ The outcome of the 2013 mayoral election may be a significant factor in the future of co-location policies in New York City.

III. ANALYSIS AND STRATEGIES FOR EASING THE CO-LOCATION BATTLE

The above examples of recent litigation make clear that current state law and local regulations do not adequately govern the co-location of charter schools with traditional public schools. They must be revised in a way that helps to reduce conflict between the two types of schools. In New York, the recent lift on the cap on charter schools promises to substantially increase the number of charter schools operating in New York City. Because it is significantly more cost-effective for charter schools to pursue a co-location arrangement than to search and subsequently pay for private space, it is likely that charter schools will continue to seek facilities in public school buildings. Accordingly, it is imperative for New York State education law and New York City regulations to be revised substantially to

237. Fernanda Santos & David W. Chen, *Mayoral Hopefuls All Make Time for Teachers' Union Leader*, N.Y. TIMES, Mar. 20, 2012, <http://www.nytimes.com/2012/03/21/nyregion/michael-mulgrew-teachers-union-chief-is-wooded-by-mayor-candidates.html>.

238. See Cramer, *supra* note 27.

239. See *id.*

240. Thomas Kaplan & Michael Grynbaum, *Quinn Loses Popularity, but Retains Lead in Mayoral Race, Poll Finds*, N.Y. TIMES CITY ROOM (Apr. 10, 2013, 6:00 AM), <http://cityroom.blogs.nytimes.com/2013/04/10/quinn-loses-popularity-but-retains-lead-in-mayoral-race-poll-finds/>.

241. Jill Colvin, *Bloomberg: Christine Quinn the Only "Rational" Democratic Candidate*, HUFFINGTON POST (Jan. 25, 2013, 1:24 PM), http://www.huffingtonpost.com/2013/01/25/bloomberg-christine-quinn_n_2551963.html.

quell the turf wars over public school space that have already arisen and will likely continue to arise.

There are problems at every stage of the co-location process, from the moment the DOE selects a school facility as a viable venue to the point in time where multiple schools exist together. At the first stage, as illustrated above, the DOE Instructional Footprint is an ineffective tool for allocating spaces to traditional public and charter schools alike. It fails to account for all of the spaces in a school building. Moreover, it does not take into full account the ways in which teachers and classes use those spaces, how often classes use them during a typical school day, and feasible alternative ways that classes could use them.

Furthermore, the law currently does not provide for adequate public participation in the ultimate decision of whether or not a charter school should be co-located in a particular building. First, the public hearings that take place after the DOE identifies a building for co-location currently amount to empty gestures. The example above of the Upper West Success Academy Charter School public hearing exemplifies this problem, where the PEP approved a co-location after 303 commenters voiced opposition and only 10 voiced support.²⁴² Such a stark imbalance indicates that public input was not a large factor in the PEP's ultimate decision. However, the opposite scenario—assessing public support or opposition by a mere counting of heads—would be equally problematic. Doing so would reward the interests of those who have the time and resources to mobilize towards hearings and would penalize the uninformed. The underlying problem here indeed may be twofold. First, in instances where truly stark imbalances exist between those who support and those who oppose a co-location, community input currently does not weigh significantly in favor of a particular outcome. Second, and perhaps more important, community members on both sides of the debate are currently under-informed about the ways in which they can participate in the process and how the law provides for the ongoing coexistence of charter and traditional public schools.

Community opposition does not merely arise from the prospect of a charter school moving into a building, but moreover from the uncertainties over the potential repercussions that will arise from an ongoing co-location. Given the increasing contentiousness between charter schools and public schools in New York City, and given the

242. See *supra* notes 180–89 and accompanying text.

inevitability that charters will continue to require space in public school buildings as they continue to expand in number, it is essential for existing law to be refined and rewritten to facilitate cooperation between co-located schools not only at the time that co-location is proposed, but also as the schools coexist. This Part will recommend that criteria for site selection should be refined. It will offer several examples of how New York Education Law and Chancellor's Regulation A-190 can be revised to reflect these criteria and will explain the shortcomings of other potential criteria. It will also argue for broader systemic changes, consisting of more accurate DOE Instructional Footprint data, more opportunity for community input, and increased collaboration between co-located schools.

A. Refine Criteria for Site Selection

One of the concerns that parents, teachers, and community members raise most frequently in opposition to co-location arrangements is that schools will become overcrowded.²⁴³ Rather than merely considering whether a school building is under-utilized based on the number of available seats, the PEP likewise should be given a guideline for what constitutes *over*-utilization of a building. New York Education Law Section 2853 and Chancellor's Regulation A-190 should be revised to require that Educational Impact Statements and Building Utilization Plans reflect no greater than a 95% building utilization rate when the co-located schools reach their full scale. This level of utilization will both encourage the efficient allocation and use of school building space while also allowing for a margin of error in calculations of anticipated enrollment and for natural fluctuations in student populations from year to year.

New York Education Law Section 2853 and Regulation A-190 should also require that EISs and BUPs include an assessment of the likely fluctuations in student population in a given traditional public school over the course of several years and to align those projections with the classroom space allotted to both schools. As the example of P.S. 9 above demonstrates,²⁴⁴ years in which a community experiences higher birth rates later can translate into a larger number of children zoned to enter kindergarten in a particular elementary school. Especially in instances where the co-located charter school serves an

243. *See supra* notes 116, 202 and accompanying text.

244. *See supra* notes 161–63 and accompanying text.

entirely different age bracket, it is important to recognize potential sources of overcrowding several years in advance.

Another criterion for site selection is the extent to which a co-location would allow current schools to continue their current programming while affording adequate space for a charter school to provide the classroom instruction and enrichment activities that it intends to offer. New York Education Law Section 2853 and Chancellor's Regulation A-190 should require the Chancellor to describe the division and allocation of spaces with heightened specificity. EISs and BUPs should itemize how the existing school or schools in a building currently use each classroom, how large each classroom is, and what amenities each classroom has (for example, sinks for art rooms, storage spaces for instruments for music classes, or lab tables for science courses), and what amenities are actually required to continue with the programming a school has in place. EISs and BUPs should then propose and justify how the existing school's programming could continue with minimal disruption if certain activities needed to be moved to different rooms to ensure that the classrooms for each respective co-located school were located in clusters rather than scattered around the building.

Similarly, Section 2853 and Regulation A-190 should require that EISs and BUPs enumerate the programming that the charter school seeking building space intends to offer. For example, the schools operated by Success Charter Network, including Upper West Success Academy, incorporate activities like music, art, yoga, chess, block play, and science into their daily curriculum and promise these activities to applicants in their marketing materials.²⁴⁵ EISs and BUPs should explicitly enumerate each of these and any other similar activities, indicate whether this academic programming can take place within the general classroom setting or requires a separate room, and itemize approximately how frequently each activity will take place and how much space each activity requires. With a more realistic picture of each school's projected needs, the PEP can attempt to align the discrete space needs of a charter school with the space available in a DOE building and determine whether a given co-location scenario is appropriate.

Section 2853 and Regulation A-190 should also be revised to require the DOE to avoid scenarios in which the burden on shared

245. *Our Curriculum*, SUCCESS ACAD. CHARTER SCHS., <http://www.successacademies.org/page.cfm?p=20> (last visited June 12, 2013).

spaces requires significant changes in student schedules. When the Chancellor identifies a building as a potential site for co-location, he should identify rooms in the building that could be repurposed for alternate uses. For example, large classrooms could be combined and utilized as libraries as a means of increasing library time per-student in each co-located school or could be used as lunch facilities to relieve students of the necessity of eating lunch in the morning.²⁴⁶ These rooms should be counted separately from the classroom count allotted to each school by the DOE Instructional Footprint and therefore should not require co-located schools to choose between having adequate classroom space for students and providing school-wide amenities like a cafeteria and a library.

Public Advocate Bill de Blasio recommends as a further criterion for site selection that New York Education Law Section 2853 and Chancellor's Regulation A-190 should be revised to require EISs and BUPs to justify proposed co-locations in part on what he terms "school compatibility" based on the ages and grade levels of the students in the building.²⁴⁷ Although it is undoubtedly more desirable for co-located schools to serve students of similar age groups, particularly when the co-located schools must share certain resources like restrooms, cafeterias, gymnasiums, and science labs, such a requirement would severely impede charter schools' ability to acquire building space and should not be adopted. The placement of charters within a given community inherently depends on the availability of space. It is not always possible to find a space for a charter school where the grades are compatible.

Furthermore, there are a number of examples of charter schools that have co-located successfully with traditional public schools where one school served elementary school students and the other school served middle or high school students.²⁴⁸ If an instance arises in which a charter school can potentially co-locate with more than one building, then it might be useful to consider age compatibility in determining which school would afford the most appropriate learning space. The factor of age compatibility on its own should not be dispositive, however, nor should the DOE be required to justify whether two schools are age compatible.

246. See *supra* note 116 and accompanying text.

247. MANNERS & RAMIREZ, *supra* note 6, at 22.

248. See, e.g., *Explore Charter School Public Comment*, *supra* note 134, at 11 (describing six examples of school buildings housing co-located schools serving different age groups).

B. More Accurate Footprint Data

The above recommendations will require heavy reliance upon data substantiating how all of the spaces in a building are used and what types of spaces are available. Currently, the DOE relies on data that does not account for all of the spaces in school buildings and therefore inaccurately represents both the actual utilization of space and the amount of leftover space that is available for other schools.²⁴⁹ It is vital for the DOE to revise its Footprint Data to account for all campus assets, including but not limited to cafeterias, auditoriums, libraries, gymnasiums, resource rooms, nurses' offices, and SETTS rooms. Although the DOE's published Instructional Footprint acknowledges that it does not account for any of the above spaces,²⁵⁰ it does not address other services that require space, such as English as a Second Language (ESL) instruction.²⁵¹ The DOE must make its footprint data more specific and account for a broader range of potential space requirements.

C. Increased Community Input

One of the most frequently expressed complaints in the charter school co-location process is that community members, particularly the parents of students in schools identified for co-location, are too frequently left out of the process.²⁵² To address this problem, several measures should be implemented. To solicit the input of a broader population of community members, Chancellor's Regulation A-190 § II(B)(4) should be revised to require that notice of the joint public hearing should be translated into the most predominantly-spoken languages in New York City, including Spanish, Haitian Creole, Mandarin, Cantonese, Korean, Bengali, and Russian, and each of these translated notices subsequently should be posted on the DOE's website. Similarly, Regulation A-190 should also be revised to require the DOE to post translated versions of EISs and BUPs on its website. The PEP currently publishes a statement of concerns raised during the public comment period and lists its reasons for not adopting significant alternatives.²⁵³ The PEP should push further,

249. *See supra* note 123 and accompanying text.

250. N.Y.C. DEP'T OF EDUC., *supra* note 108, at 4.

251. *See generally id.*

252. *See supra* note 156 and accompanying text.

253. Chancellor's Regulation A-190 § II(C)(4).

however, and translate this statement into the languages listed above and publish it on the DOE's website.

Although Regulation A-190 requires the chancellor to publish advance notice of the public hearing and opens a period for written comment,²⁵⁴ it does not specify how far in advance the Chancellor must publish such notice.²⁵⁵ Regulation A-190 should be rewritten to require the Chancellor to publish the advance notice at least two weeks in advance of the hearing to increase the chances that interested parties may attend. Regulation A-190 also should require notices of the hearing to be printed on paper and distributed to students of the school to be affected by the co-location at least two weeks in advance of the hearing to increase the chance that their parents will be informed of the hearing.

D. Stronger Provisions for Cooperation Between Schools

Currently, Section 2853 and Chancellor's Regulation A-190 require shared space committees to meet four times per school year to discuss the implementation of the BUP.²⁵⁶ Both should be revised to require shared space committees to meet every other week for the first two months after a new co-location begins, and at least once a month thereafter. Quarterly meetings are too far apart to maintain a continuing dialogue between co-located schools. Imposing more structure upon the manner in which representatives from co-located schools interact would help the schools to continually monitor the progress of identified problems and would also facilitate the identification of problems before they become too unwieldy.

Section 2853 and Regulation A-190 should also be revised to require shared space committees to keep minutes of their meetings and to post them on their respective schools' websites. Doing so would help to maintain transparency about the interactions between co-located schools and would give parents and community members a more concrete sense of how co-locations affect their children's schools. Section 2853 and Regulation A-190 should also require shared space committees to solicit student, parent, and community feedback to be discussed at their meetings. By heightening interaction and cooperation between co-located schools on an

254. *Id.* § II(B)(4).

255. *See generally id.*

256. N.Y. EDUC. LAW § 2853(3)(a-4) (McKinney 2013); Chancellor's Regulation A-190 § III(b)(1)(a)-(b).

administrative level, potential problems may be solved more efficiently and diplomatically.

CONCLUSION

Charter schools and traditional public schools alike have an interest in educating their students in an environment that is safe, comfortable, and that fosters learning. Without space in public school buildings, it will be difficult for charter schools to continue to serve students on the scale that they currently can and on the level that helped earn New York City its Race to the Top funding. The need for space will increase as the number of charter schools increases both in New York City and statewide. As the case studies of the co-location between P.S. 9 and BECCS and Upper West Success Academy and the Brandeis Educational Complex demonstrate, however, the process through which the Department of Education allocates space to charter schools does not sufficiently address the challenges that arise when charter schools co-locate with public schools. Although a perfect solution may be hard to come by, it is clear that the laws that govern the sharing of space, New York Education Law Section 2853 and Chancellor's Regulation A-190, must be revised. Doing so will better facilitate the process through which schools are co-located to maximize the fair and efficient allocation of space, and ultimately to create better learning environments for children, regardless of whether they attend a traditional public school or a charter school.